

27 NOV 2019



Canada Border Services Agency
Agence des services frontaliers du Canada

For information

THE CANADA BORDER SERVICES AGENCY'S EXAMINATION OF DIGITAL DEVICES

For the Minister

ISSUE

The Office of the Privacy Commissioner (OPC) will be releasing a report on the Canada Border Services Agency's (CBSA) examination of digital devices based on six *Privacy Act* complaints. In this report, the OPC found that CBSA officers breached the *Privacy Act* and made nine recommendations in regard to the Agency's examination of digital devices. The CBSA has accepted six of these recommendations that relate to policy changes and has not accepted three recommendations relating to legislative changes.

BACKGROUND

Digital devices are considered "goods" as defined under the *Customs Act*. Therefore, they are subject to the same examination authorities as other types of goods crossing the border. The CBSA has always had a policy for examining goods; to provide greater certainty, the Agency has developed a more precise policy on the examination of digital devices. Paragraph 99(1)(a) of the *Customs Act* gives officers the authority to examine goods at the border for customs-related purposes. Though 99(1)(a) provides the authority for a no-threshold examination of goods, as a matter of policy, the CBSA has introduced a threshold in recognition of the potential sensitive nature of information on digital devices. Officers are instructed to gather a multiplicity of indicators that a contravention of border laws can be found on a device before commencing a digital device examination.

From November 20, 2017, to October 31, 2019, only 0.013% of travellers had a digital device examined. That equates to 26,015 travellers out of a total of 194,117,614 travellers. Of those examinations, 39.4% uncovered an infraction. That is 10,250 instances of non-compliance. This demonstrates that CBSA officers' concerns are often founded and the policy is effective in supporting digital device examinations. For comparison, in fiscal year 2017-2018, approximately 2% of secondary examinations, in general, resulted in an enforcement action and 18% resulted in an enforcement or facilitation action.

The CBSA has successfully defended its ability to examine digital devices in over 15 court cases. Consistently, courts have held that the authority to examine digital devices falls under 99(1)(a) of the *Customs Act* and that such examinations do not violate a traveller's Charter rights.

In addition, the CBSA's digital device examination practices are in line with Canada's Border Five partners' procedures.

To date, the Agency has been operating under an interim guidance issued in 2015. The CBSA will be implementing a new, comprehensive Policy on Port of Entry Examinations of Travellers' Digital Devices in November 2019. This policy will provide further clarification and guidance to officers. It will emphasize disabling network connectivity before conducting a digital device examination and the need to keep accurate, contemporaneous notes. Both of these issues have been at the forefront of court cases and OPC complaints.

OPC Report of Findings

The OPC has completed a Report of Findings on the CBSA's examination of digital devices, such as cellphones, tablets, and laptops. The Report is based on six *Privacy Act* complaints against the Agency and more broadly examines the CBSA's practices, procedures, and related legal authorities. The OPC makes nine recommendations in the Report in regard to the CBSA's examination of digital devices. The Agency has previously responded to each of the six complaints individually and was also given the opportunity to respond to the Report's recommendations before it was finalized.

The CBSA has addressed six policy-related recommendations raised by the OPC:

- providing mandatory training for officers;
- improving oversight of compliance;
- scheduling an audit of the policy;
- updating the CBSA Enforcement Manual;
- increasing transparency; and
- tracking and reporting digital device examinations.

The Agency will be providing mandatory training for new recruits and existing officers, which will be accompanied by various job aids. A robust oversight framework to monitor compliance will be implemented with the launch of the new Policy and will include spot checks as well as formal reviews of compliance with the Policy at ports of entry. In line with this, the CBSA will be conducting an internal audit of the Policy after it has been in place for at least a year. The new Policy will be posted as a chapter in the CBSA's Enforcement Manual, and, to increase transparency, a public information campaign will be launched based on the Policy that explains travellers' obligations and rights with respect to digital device examinations. The Agency has been tracking and reporting on digital device examinations since November 2017 and continues to report to the OPC on a biannual basis. The CBSA will also publish those statistics on its website.

Based on the above actions by the CBSA, the OPC considers the six issues raised to be conditionally resolved.

The OPC's Report also provided three recommendations that would require changes to the *Customs Act*. The CBSA did not accept these recommendations and provided explanations to the OPC as to why they were not accepted. In the Report, the OPC recognizes that legislative changes are a parliamentary matter; it therefore refers these recommendations to the Minister of Public Safety and former Minister of Border Security and Organized Crime Reduction to consider.

Two of the recommendations for legislative changes are in line with what the Standing Committee on Access to Information, Privacy and Ethics (ETHI) recommended in its December 2017 report, *Protecting Canadians' Privacy at the U.S. Border*. The CBSA's responses to the OPC Report are in line with what the Government of Canada submitted in response to the ETHI Report. The OPC's legislative recommendations are as follows:

1. **OPC recommendation:** Change the definition of "goods" within the *Customs Act* to exclude digital devices in order to highlight that these devices contain personal information and are, in the OPC's estimation, not mere goods.

CBSA response: In the Report, the OPC acknowledges that courts have held that digital devices are goods as defined in the *Customs Act*. Excluding digital devices from that definition would create an untenable situation in which officers could examine a printed receipt found in a piece of luggage but could not examine that same receipt if it were stored on a digital device.

As smartphones and related technologies continue to advance, this distinction would impede the CBSA in meeting its legislated mandate and serve to exempt more and more goods from examination. This could result in prohibited goods, such as child pornography or hate propaganda, being admitted into Canada because officers are unable to examine the devices that the prohibited goods are stored on. From 2014 to 2018, 77% of child pornography seizures were found on digital devices. From 2016 to 2018, 43% of suspected obscenity and hate propaganda was found on digital devices.

2. **OPC recommendation:** Amend the *Customs Act* to include the policy-imposed higher threshold for the examination of digital devices (also an ETHI recommendation).

CBSA response: Because both technology and the operating environment at the border are evolving at a rapid pace, it is important that CBSA have the ability to adapt and update its policies in response. Writing policy into law takes away this adaptability. In addition, the lengthy process required to make legislative changes could leave gaps in border enforcement should policy changes be required in the future.

3. **OPC recommendation:** Amend the *Customs Act* to include a higher threshold of reasonable grounds to suspect for the examination of digital devices (also an ETHI recommendation).

CBSA response: It is in the very nature of the border environment that there is a lack of prior knowledge or control over goods before they reach the border. With no prior knowledge or information, it can be impossible to formulate reasonable suspicion in relation to goods arriving at the border. The CBSA is concerned that if a legal threshold of reasonable suspicion were to be imposed, despite anomalies observed by officers, circumstances would fall short of reasonable suspicion and would leave officers with no means to further advance to that threshold.

NEXT STEPS

The CBSA will launch its new, comprehensive Policy on Port of Entry Examinations of Travellers' Digital Devices by the end of November 2019. This will be accompanied by mandatory training for existing officers and recruits, along with an educational campaign to inform the public of what to expect if their digital device is examined and their responsibility to unlock that device for examination. The new Policy is an elaboration on the current interim guidance that has been provided to officers. It provides greater clarity on issues such as encountering intimate images or evidence of a criminal nature, as well as further instruction on when, how, and what to examine on a digital device.

The CBSA is also closely monitoring the timing of and preparation for the release of the Privacy Commissioner's Report in early December 2019, once Parliament returns. The Agency has planned for any follow-on action that may be required as a result of the tabling of the Report, including a potential requirement for appearances by senior officials at parliamentary committees and the launch of the public web page.

Please note that I am available to discuss, or have CBSA officials brief your staff, at your convenience.

27 NOV. 2019



John Ossowski
President

c.c.: Ms. Monik Beauregard, A/Deputy Minister
Public Safety Canada



Canada Border
Services Agency

Agence des services
frontaliers du Canada



CBSA's Examination of Travellers' Digital Devices at Ports of Entry

Minister's Briefing

December 3, 2019

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ISSUE

- The Office of the Privacy Commissioner (OPC) will be tabling in Parliament a Report on the CBSA's examination of digital devices in early December
- The OPC Report has found that some CBSA Officers contravened the *Privacy Act*, and that there are failings and chronic issues with adherence to CBSA's direction on the examination of digital devices

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Issue:

The impetus for this briefing is the upcoming tabling in Parliament of the Office of the Privacy Commissioner's (OPC) Report on the CBSA's examination of digital devices

The Report will also be made public on the OPC's website after its tabling

The Report is based on six *Privacy Act* complaints against the Agency and more broadly examines the CBSA's practices, procedures and related legal authorities

The OPC found that some Officers contravened the *Privacy Act* and that there are failings and chronic issue with adherence to the CBSA's direction on the examination of digital devices

To address these issues, CBSA has been working on a new Policy to address these shortcomings

The draft policy has been shared with the OPC who provided CBSA with feedback, all the OPC's comments were incorporated into the policy



BACKGROUND

- Digital devices are considered “goods” under the *Customs Act* and are subject to the same examination as other goods crossing the border
- Digital device examinations are only performed if the Officer has a multiplicity of indicators that a contravention of border laws can be found on the device
- CBSA’s examination authorities have been successfully defended in Court
- CBSA practice of examining travellers’ digital devices have come under increased scrutiny in recent years from the media, the public, civil liberties groups and the OPC

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Background:

CBSA has the authority to examine digital devices at the border because digital devices, including cellphones, tablets and laptops, are considered goods under the *Customs Act*

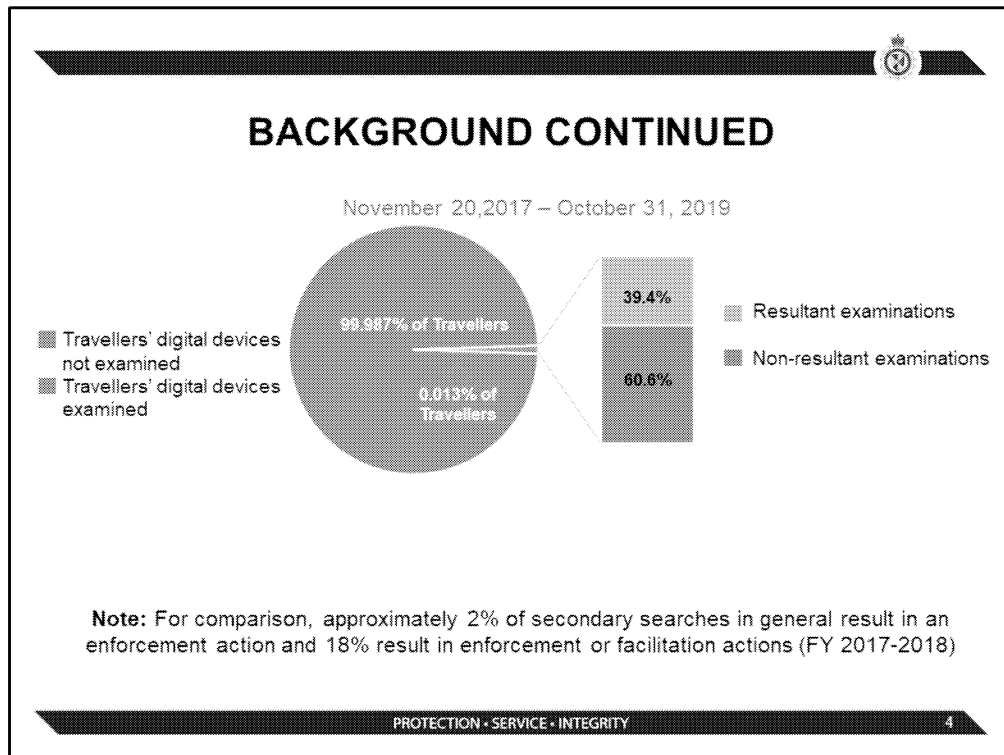
There has been, in recent years, increased scrutiny of all countries’ digital device examination practices, including the Canada’s

The media, public, civil liberties groups and the OPC have all been closely examining and monitoring the Agency’s practices when it comes to this type of examination

The CBSA has been operating under existing policies complimented by interim guidance specific to the examination of digital devices since 2015 and has successfully defended those policies and guidance in Court in seven constitutional challenges

The Agency has also responded to eight *Privacy Act* complaints relating to the examination of digital devices

Though digital device examinations can take place on a no-threshold basis, that is without individualized suspicion, it is CBSA’s policy to only perform these examinations if an Officer has a multiplicity of indicators that a contravention of border laws can be found on the device.



Background Continued:

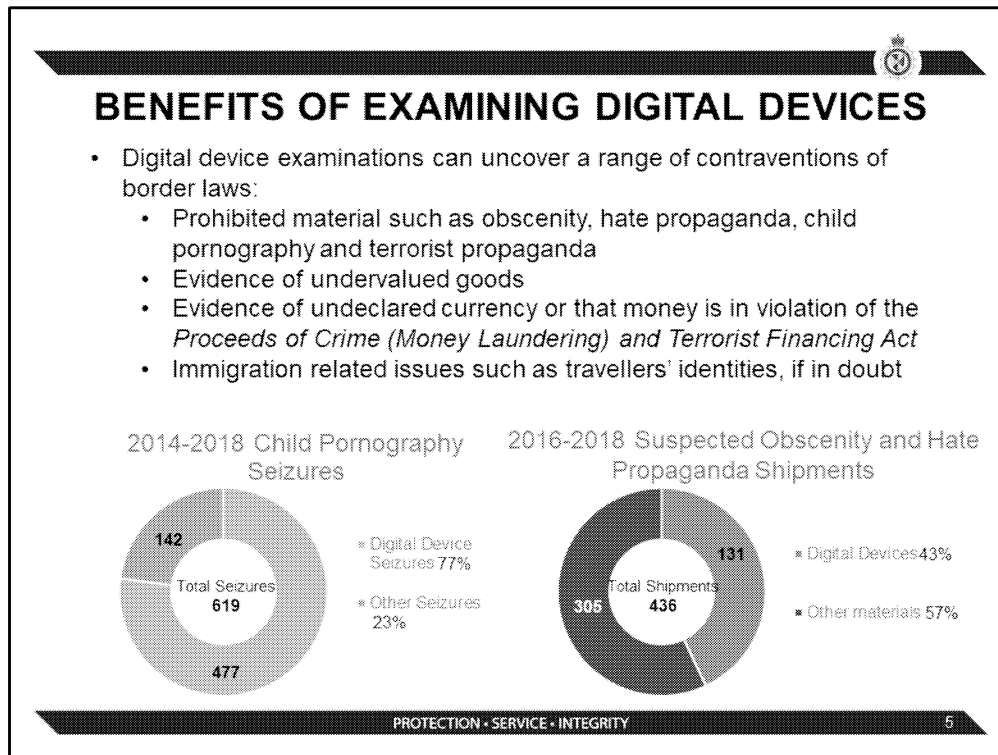
Because of the guidance provided to officers is to only examine if there are multiple indicators present that raise an Officer's concerns, the number of travellers who have a digital device examined is very low

We began recording statistics in November 2017 and from then until October 2019, only 0.013% of travellers had a digital device examined

39.4% of those examinations were resultant for a contravention of border laws

This demonstrates the effectiveness of the policies and guidance given to Officers conducting digital device examinations

For comparison, in fiscal year 2017-2018, 2% of secondary examinations in general resulted in an enforcement action and 18% resulted in an enforcement or facilitation action



Benefits of Examining Digital Devices :


The examination of digital devices is an important activity the CBSA uses to fulfil its mandate to maintain the security of Canada and Canadians and to ensure all goods entering the country are compliant with Canada's laws and regulations

Digital device examinations can uncover a range of contraventions of border laws, especially now as more and more is being stored on these devices

From 2014-2018, 77% of child pornography seized was found on a digital device

From 2016-2018, 43% of suspected obscenity and hate propaganda was found on a digital device

Officers also examine digital devices to uncover evidence of undervalued goods, to confirm traveller declarations and to establish travellers' identities



OPC REPORT OF FINDINGS

- Report based on 6 *Privacy Act* complaints against the CBSA regarding examination of digital devices
- OPC found that the CBSA explicitly contravened the *Privacy Act* in 2 cases
- OPC also noted CBSA officers failed to comply with 1 or more requirements of CBSA policy and guidance in all cases
- CBSA has accepted all 6 policy-related recommendations but has not accepted 3 legislative change recommendations
- OPC requests that the Minister of Public Safety and former Minister of Border Security and Organized Crime Reduction reconsider these three recommendations
- CBSA's position is that legislative changes are unnecessary and will unduly restrict CBSA Officers in performing their duties

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OPC Report of Findings:

In its Report, the OPC found that CBSA explicitly contravened the *Privacy Act* in 2 cases and had serious issues with officers complying with Agency policies in all cases


In its Report, the OPC made six policy-related recommendations that the CBSA has accepted, these recommendations were:

- Issue mandatory training for existing officers and new recruits undergoing the Officer Induction Training Program
- Ensure there is an oversight and compliance regime associated with the Policy
- Conduct an audit of the policy
- Update CBSA's Enforcement Manual with the new comprehensive Policy
- Increase transparency and accountability by providing the travelling public with information about the digital device examination procedure
- Track and report statistics related to the examination of digital devices and publish on CBSA's website

The OPC also made three recommendations for changes to the *Customs Act*

In its Report, the OPC refers these recommendations to the Minister of Public Safety for reconsideration

The CBSA's position is that legislative changes are unnecessary and will unduly hamper Officers in performing their duties

 OPC REPORT OF FINDINGS POLICY RECOMMENDATIONS		
	Recommendation	CBSA Response
1	Mandatory Training	Training will be mandatory for existing officers and new recruits
2	Oversight and monitor compliance	There will be a robust compliance regime
3	Independent audit	An internal audit will be conducted
4	Update CBSA Manuals	The Enforcement Manual will be updated with the Policy on Port of Entry Examinations of Travellers Digital Devices
5	Transparency and Accountability	Comprehensive external communications plan to inform the public of what to expect during a digital device examination
6	Tracking and reporting examinations of digital devices	Will continue to track and report to the OPC and will post on CBSA public website
Based on the CBSA's responses, the OPC considers the policy issues raised in their Report conditionally resolved.		
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Slide 8 – OPC Report of Findings: Policy Recommendations

The CBSA has accepted all the OPC's policy-related recommendations

Mandatory training will be issued online for existing officers and incorporated into the Officer Induction Training Program for recruits

A robust compliance regime will be implemented and include:

- Monitoring training completion**
- Monitoring statistics regarding number of examinations and resultant rate**
- Spot checks**
- Port Program Assessments**
- Internal audit**

The OPC recommendation was for an independent audit of CBSA's policy but the OPC accepts that an internal audit will fulfil the spirit of this recommendation

The CBSA Enforcement Manual will be updated to include a chapter on the examination of digital devices

In order to be more transparent about the digital device examination process, the CBSA will be launching a comprehensive external communications plan that includes a social media campaign to educate travellers on their obligation to unlock their devices for examination and to inform them of what to expect if their device is examined

CBSA will continue to track the number of digital device examinations and will continue to report to the OPC biannually; the Agency will also post statistics on its public website to further increase transparency regarding the CBSA's examination of digital device

Based on these responses and proposed actions by the Agency, the OPC considers the issues raised in their Report conditionally resolved



OPC REPORT OF FINDINGS LEGISLATIVE RECOMMENDATION 1

- Change the definition of “goods” within the *Customs Act* to exclude digital devices in order to highlight that these devices contain personal information and are, in the OPC’s estimation, not mere goods

CBSA Response:

- Courts have held that digital devices are goods as defined in the *Customs Act*
- Excluding digital devices could lead to Officer being able to examine a printed receipt but not one stored on a device
- As technology advances, this would exempt more and more goods from examination
- Would hamper the CBSA in fulfilling its legislated mandate

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OPC Report of Findings: Legislative Recommendation 1


The OPC is recommending that the definition of goods be changed in the *Customs Act* to exclude digital devices

In the CBSA’s response, the Agency reminded the OPC that courts have held that digital devices are goods and sought to explain the impact this change would have on Officers

Excluding digital devices from the definition of goods could lead to an Officer being able to examine a printed receipt but not one stored on a digital device

As technology advances, this would exempt more and more goods from examination as people store more things digitally

This would severely curtail the Agency’s effectiveness and compromise its ability to fulfil its mandate



OPC REPORT OF FINDINGS LEGISLATIVE RECOMMENDATION 2

- Amend the *Customs Act* to include the policy-imposed higher threshold for the examination of digital devices

CBSA Response:

- Would prevent the CBSA from responding quickly with necessary policy changes to changes in technology or the operating environment at the border


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OPC Report of Findings: Legislative Recommendation 2

As mentioned earlier, the CBSA has introduced a threshold of a multiplicity of indicators to the examination of digital devices, the OPC would like the Agency to formalize this policy in the *Customs Act*

This change would pose a problem for the CBSA because technology and the operating environment at the border changes quickly and the process for changing legislation is very lengthy

This could leave gaps in border enforcement if there is a need to change the *Customs Act* to address changes at the border instead of performing a simple policy update



OPC REPORT OF FINDINGS LEGISLATIVE RECOMMENDATION 3

- Amend the *Customs Act* to include a higher threshold of reasonable grounds to suspect for the examination of digital devices

CBSA Response:

- Lack of prior knowledge or control over goods before they reach the border
- Can make it impossible to formulate reasonable suspicion
- Would lead to situation where Officer has concerns and has observed anomalies but has no means to confirm or deny concerns because cannot conduct digital device examination

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OPC Report of Findings: Legislative Recommendation 3

The last recommendation the OPC makes is to amend the *Customs Act* to impose a threshold of reasonable grounds to suspect before a digital device examination can be conducted

This would pose similar issues as the previous recommendation but also introduces what could be an impossible threshold to meet

It's in the nature of the border environment that there is no prior knowledge or control over goods before they reach the border and this can make it impossible to formulate reasonable suspicion

This would lead to a situation where an Officer has concerns about a traveller or their goods but has no confirm or negate those concerns because they cannot conduct a digital device examination



NEXT STEPS

- The comprehensive Policy on Port of Entry Examinations of Travellers' Digital Devices will be released internally to the CBSA on November 29, 2019
- The Policy will go into force December 2, 2019 and will be accompanied by mandatory training and detailed internal and external communications
 - Training for new recruits will be incorporated within the Officer Induction Training Program
 - Training for existing officers will be mandatory to complete within three months of the launch of the policy
 - Internal communications products to help Officers apply the new policy
 - Educational campaign to inform travellers of what to expect if their digital device is examined and their responsibility to unlock that device for examination

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Next Steps

The CBSA will launch its comprehensive Policy on Port of Entry Examinations of Travellers' Digital Devices on December 2, 2019

This launch will be accompanied by training for existing officers and training for new recruits will be incorporated into the Officer Induction Training Program

There will also be a comprehensive internal and external communications plan that is aimed at educating both Officers and the travelling public about the digital device examination process



NEXT STEPS CONTINUED

- There will be a robust compliance regime to accompany the policy to monitor compliance, including:
 - Monitor training completion
 - Monitor statistics regarding number of examinations and resultant rate
 - Spot checks
 - Port Program Assessments
 - Internal audit
- A review of other CBSA policies will also be undertaken
- A revised notetaking policy is expected to be issued shortly to further compliment and support this and other Agency activities

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Next Steps Continued

There will be a robust compliance regime to accompany the policy to monitor compliance, including:

- Monitor training completion
- Monitor statistics regarding number of examinations and resultant rate
- Spot checks
- Port Program Assessments
- Internal audit

A review of other CBSA policies will also be undertaken

In this vein, a notetaking policy is expected to be issued shortly that will compliment and support the digital device examination policy as well as other Agency activities



ANNEX 1: POLICY ON PORT OF ENTRY EXAMINATIONS OF TRAVELLERS' DIGITAL DEVICES

- Built on existing policies on the examination of goods and the interim guidance provided to officers in 2015
- Provides greater clarity on issues like:
 - When, how and what to examine on a digital device
 - How to ensure the privacy of the traveller is respected
 - Directives on notetaking
 - What to do when encountering intimate images, evidence of a criminal nature or information subject to solicitor-client privilege
 - Elaborates on the roles and responsibilities of officers, superintendents and chiefs

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Policy on Port of Entry Examinations of Travellers' Digital Devices

This new policy expands on the current policies and interim guidance that officers are operating under

It provides greater clarity on issues like:

When, how and what to examine on a digital device

How to ensure the privacy of the traveller is respected

Directives on notetaking

What to do when encountering intimate images, evidence of a criminal nature or information subject to solicitor-client privilege

Elaborates on the roles and responsibilities of officers, superintendents and chiefs

